Government of Sarawak & Anor v Busing ak Jali & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS Q-01–79–03 OF 2014 AND Q-02–524–03 OF 2014
TENGKU MAIMUN, ZALEHA YUSOF AND ABDUL KARIM JJCA
14 JANUARY 2019

Evidence — Witness — Interested witness — Plaintiffs filed action claiming native customary right over land — Plaintiffs relied on evidence given by two plaintiffs — Whether plaintiffs witnesses with interest — Whether evidence by plaintiffs self-serving

Land Law — Native title — Land rights — Claim for native customary right ('NCR') over land by plaintiffs — Whether plaintiffs created or acquired NCR over land — Whether provisional lease issued illegal, null and void — Whether plaintiffs' claim caught by limitation

The plaintiffs were Ibans and natives of Sarawak. They were residents of Rumah Mawar, Tanjong Pedada, Mukah, Sarawak. They claimed that since time immemorial, their ancestors, descendants and now they themselves had long acquired and created individual and/or communal native customary rights ('NCR') over the lands at Sg Kenyana, Mukah, Sarawak consisting of an area of 580.1 hectares more or less, together with the forests, streams and rivers there on ('the said land'). On or about 17 September 1998, the Superintendent of Lands and Surveys, Mukah Division ('the second defendant') had issued a provisional lease for Lot 11, Mukah Land District ('Lot 11') to Empire Plantation Sdn Bhd ('the third defendant') which the plaintiffs claimed to have encroached part or covered almost the entire part of the said land. Consequently, the plaintiffs filed an action in the High Court and pleaded that their NCR pre-exist the Sarawak Land Code (Cap 81) and had never been extinguished in accordance with law. The plaintiffs further pleaded that the said provisional lease was inequitable, illegal, oppressive, an abuse of power and unconstitutional. At the end of the proceedings, the learned judicial commissioner ('the JC') after hearing the witnesses, especially the third plaintiff ('PW1') and the first plaintiff ('PW3') who were born in 1928 and 1956 respectively, concluded that the plaintiffs had proven creation and acquisition of NCR by way of 'Pemakai Menoa', 'Temuda' and 'Pulau Telu'; that the provisional lease was illegal, null and void; and that the plaintiffs' claim was not barred by limitation. The learned JC therefore allowed the plaintiffs' claim with costs, hence, the present appeals. The issues for the court's determination were: (a) whether the plaintiffs had created or acquired NCR

over the said land; (b) whether the provisional lease for Lot 11 was illegal, null and void; and (c) whether the plaintiffs' claim was caught by limitation.

Held, allowing the appeals and setting aside the High Court's order:

(1) The position of our apex court had always been consistent in that the NCR claim over land founded upon the concept of continuous occupation did not extend to areas where the native used to roam to forage for their livelihood. Therefore, the learned JC erred when he held that clearing of land or 'Temuda' was only part of the NCR lands and that other practices such as 'Pemakai Menoa' and 'Pulau Telu' must also be included. In addition, there was evidence of the defendants' expert which was not challenged by the plaintiffs that almost the entire area claimed by the plaintiffs which was 580.1 hectares were covered with primary forest in 1950 and 1954 and even in 1959. Only a small portion of the whole area claimed by them which was totaling 23 hectares was cleared area in 1950 and 1954 and even in 1959. There was also no evidence to show it was the plaintiffs' ancestors who had actually cleared and cultivated the said lands. In the present case, other than the plaintiffs' mere assertion, the plaintiffs had failed to prove they had acquired NCR over the said lands (see paras 19–20, 22 & 24).

(2) The plaintiffs' assertion that they had acquired the NCR was their bare assertion. Their evidence was self-serving as being the plaintiffs, they were witnesses with interest. On totality, as the court found that the plaintiffs had failed to prove that they had acquired NCR over the said lands, the second and third issues did not require any further determination (see paras 26 & 30–31).

[Bahasa Malaysia summary

Plaintif-plaintif adalah kaum Iban dan anak watan Sarawak. Mereka adalah penduduk Rumah Mawar, Tanjong Pedada, Mukah, Sarawak. Mereka mendakwa bahawa sejak dahulu kala, nenek moyang, keturunan mereka dan kini mereka sendiri telah lama memperoleh dan mempunyai hak individu dan/atau adat anak watan ('HAAW') ke atas tanah di Sg Kenyana, Mukah, Sarawak yang terdiri daripada kawasan seluas lebih kurang 580.1 hektar, bersama dengan hutan dan sungai atas tanah itu ('tanah tersebut'). Pada atau sekitar 17 September 1998, Superintendan Tanah dan Ukur, Daerah Mukah ('defendan kedua') telah mengeluarkan pajakan sementara untuk Lot 11, Daerah Tanah Mukah ('Lot 11') kepada Empire Plantation Sdn Bhd ('defendan ketiga') yang mana plaintif-plaintif telah mendakwa telah menceroboh sebahagian atau meliputi hampir keseluruhan bahagian tanah tersebut. Berikutan itu, plaintif-plaintif telah memfailkan tindakan di Mahkamah Tinggi dan mempli bahawa HAAW mereka telah wujud sebelum Kanun Tanah Sarawak (Cap 81) dan tidak pernah dilupuskan menurut undang-undang. Plaintif-plaintif selanjutnya mempli bahawa pajakan

sementara tersebut tidak saksama, menyalahi undang-undang, menindas, dan menyalahguna kuasa dan tidak berperlembagaan. Di akhir prosiding, pesuruhjaya kehakiman yang bijaksana ('PK') selepas mendengar saksi-saksi, terutamanya plaintif ketiga ('PW1') dan plaintif pertama ('PW3') yang lahir pada 1928 dan 1956 masing-masingnya, memutuskan bahawa plaintif-plaintif telah membuktikan penciptaan dan pemerolehan HAAW melalui 'Pemakai Menoa', 'Temuda' dan 'Pulau Telu'; bahawa pajakan sementara itu menyalahi undang-undang, terbatal dan tidak sah; dan tuntutan plaintif-plaintif tidak halang oleh had masa. PK yang bijaksana dengan itu membenarkan tuntutan plaintif-plaintif dengan kos, justeru, rayuan-rayuan ini. Isu-isu untuk ditentukan mahkamah adalah: (a) sama ada plaintif-plaintif telah mencipta atau memperoleh HAAW ke atas tanah tersebut; (b) sama ada pajakan sementara untuk Lot 11 menyalahi undang-undang, terbatal dan tidak sah; dan (c) sama ada tuntutan plaintif terhalang oleh had masa.

Diputuskan, membenarkan rayuan-rayuan dan mengetepikan perintah Mahkamah Tinggi:

(1) Kedudukan mahkamah tertinggi sentiasa konsisten di mana tuntutan HAAW ke atas tanah yang berasaskan konsep pendudukan berterusan tidak dilanjutkan ke kawasan di mana anak watan biasa berkeliaran untuk mencari makanan. Oleh itu, PK yang bijaksana terkhilaf apabila beliau memutuskan bahawa pembukaan tanah atau 'Temuda' hanya sebahagian daripada tanah HAAW dan amalan lain seperti 'Pemakai Menoa' dan 'Pulau Telu' juga perlu dimasukkan. Tambahan, terdapat keterangan pakar defendan-defendan yang tidak dicabar oleh plaintif-plaintif bahawa hampir keseluruhan kawasan yang dituntut oleh plaintif-plaintif iaitu 580.1 hektar diliputi hutan dara pada 1950 dan 1954 dan juga 1959. Hanya sebahagian kecil keseluruhan kawasan itu dituntut oleh mereka yang berjumlah 23 hektar merupakan kawasan yang dibuka pada 1950 dan 1954 juga pada 1959. Juga tiada keterangan untuk menunjukkan bahwa keturunan plaintif-plaintif yang sebenarnya membuka dan bercucuk tanam atas tanah tersebut. Dalam kes ini, selain daripada pernyataan semata-mata plaintif-plaintif, plaintif-plaintif telah gagal membuktikan mereka telah memperoleh HAAW ke atas tanah tersebut (lihat perenggan 19–20, 22 & 24).

(2) Hujah plaintif-plaintif bahawa mereka telah memperoleh HAAW adalah pernyataan semata-mata mereka. Keterangan mereka mementing diri sendiri sebagai plaintif-plaintif, mereka adalah saksi-saksi berkepentingan. Secara keseluruhan oleh kerana mahkamah mendapati plaintif-plaintif telah gagal membuktikan bahawa mereka telah memperoleh HAAW ke atas tanah tersebut, isu-isu kedua dan ketiga tidak memerlukan penentuan selanjutnya (lihat perenggan 26 & 30–31).]

Notes

For a case on land rights, see 8(3) *Mallal's Digest* (5th Ed, 2015) para 4334. For cases on interested witness, see 7(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3638–3656.

Cases referred to

Agi ak Bungkong & Ors v Ladang Sawit Bintulu Sdn Bhd & Ors [2010] 4 MLJ 204; [2010] 1 LNS 114, HC (refd)

Binglai Anak Buassan & Ors (suing on behalf of themselves and other proprietors, occupiers, holders and claimants of Native Customary Rights (NCR) land surrounding Kampung Sebat Dayak and Kampung Siru Dayak, situated at Semantan, 94500 Lundu, Sarawak) v Entrep Resources Sdn Bhd & Ors [2014] MLJU 1908, HC (refd)

Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals [2017] 2 MLJ 281; [2017] 3 CLJ 1, FC (refd)

Everly Bajut ak Poh & 24 others v The State Government of Sarawak & 2 Ors Civil Suit No 22–26 of 2008 (unreported) (folld)

Matu Tugang (suing on behalf of themselves and 42 other proprietors, occupiers, holders and claimants of native customary rights (NCR) land situated at Kampung Long Jaik, Sungei Seping, Belaga, 96900 Belaga, Sarawak) v Shin Yang Forestry Sdn Bhd & Ors [2017] 7 MLJ 505; [2017] 2 CLJ 82, HC (refd)

Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors [2002] 2 MLJ 591; [2002] 2 AMR 169, HC (refd)

Sanabung ak Sampai & Ors v Hydroflow Sdn Bhd & Ors [2014] 7 MLJ 429, HC (refd)

Superintendent of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as Administrator of the Estate of the deceased, Salleh bin Kilong) [2008] 2 MLJ 677; [2007] 6 CLJ 509, FC (refd)

Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appea [2006] 1 MLJ 256; [2005] 4 AMR 621, CA (refd)

Usang ak Labit & 3 ors v Rosebay Enterprise Sdn Bhd Suit No 21–1 of 2010 (unreported), HC (refd)

Legislation referred to

Companies Act 1965
Land Code (Cap 81) s 2, 2(a)

Appeal from: Suit No 21–9 of 2010 (High Court, Sibu)

Saferi bin Ali (Evy Liana bt Atang with him) (Sarawak State Attorney-General's Chambers) in Civil Appeal No Q-01–79–03 of 2014 for the appellants.
Siti Norashidah bt Dollah (Danny Huang Dung Po with her) (Huang & Co) in

Civil Appeal No Q-02–524–03 of 2014 for the appellant.
Mekanda Singh Sandhu (Paul Raja with him) (Sagau Raja & Co) in Civil Appeal Nos Q-01–79–03 of 2014 and Q-02–524–03 of 2014 for the respondent.

Zaleha Yusof JCA:

[1] These two appeals were against the decision of the High Court at Sibu in Suit No 21–9 of 2010 ('the said suit'), in allowing the plaintiffs' claims for the following orders:

(a) a declaration that the plaintiffs have acquired and/or created individual or communal NCR (native customary rights) over the said land now covered by provisional lease Lot 11 but limited to only 1,391.42 acres as surveyed by PW5 and mapped by PW6 in exh 23 of PBOD;

(b) a declaration that the rights precluded any one or more of the defendants from acquiring, impairing, abridging or extinguishing the plaintiffs' rights in the said land;

(c) a declaration that the provisional lease to the extent of the said 1,391.42 acres is bad in law and/or null and void;

(d) the plaintiffs be given forthwith vacant possession of their native customary land;

(e) an order that the said land in so far as it is affected by the said provisional lease shall be excised out from the said provisional lease;

(f) a mandatory injunction against the third defendant to cease all operations and remove all structures, equipments etc from the said land;

(g) exemplary damages to be assessed by the deputy registrar/SAR; and

(h) getting up costs of RM75,000 with interest of 5% to be paid to the plaintiffs and be equally borne by all the defendants.

The appellants in Appeal No Q-01–79–03 of 2014 were the first and second defendants respectively in the said suit while the appellant in Appeal No Q-02–524–03 of 2014 was the third defendant in the said suit. The respondents in these two appeals were the plaintiffs in the said suit. For convenience, parties shall be referred to as they were in the High Court.

BRIEF BACKGROUND FACTS

[2] The plaintiffs are Ibans and natives of Sarawak. They are residents of Rumah Mawar, Tanjong Pedada, Mukah, Sarawak. They claim that since time immemorial, their ancestors, their descendants and now they themselves have long acquired and created individual and/or communal native customary

A rights over the lands at Sg Kenyana, Mukah, Sarawak consisting of an area of 580.1 hectares more or less, together with the forests, streams and rivers there on ('the said lands').

B **[3]** The first defendant is the State Government of Sarawak while the second defendant is the Superintendent of Lands and Surveys, Mukah Division, Sarawak. The third defendant is a company incorporated under the Malaysian Companies Act 1965.

C **[4]** On or about 17 September 1998, the second defendant had issued a provisional lease for Lot 11, Mukah Land District to the third defendant which the plaintiffs claim to have encroached part or covered almost the entire part of the said lands.

D **[5]** On 30 November 2010 the plaintiffs filed this action and pleaded that their native customary right ('NCR') pre-exist the Sarawak Land Code (Cap 81) and had never been extinguished in accordance with law. They also pleaded that the said provisional lease is inequitable, illegal, oppressive, an abuse of power and unconstitutional. This action was brought by the plaintiffs E for themselves and not on behalf of all the residents of Rumah Mawar.

[6] The learned judicial commissioner ('JC') after hearing the witnesses, especially PW1 (the third plaintiff) and PW3 (the first plaintiff) who were born in 1928 and 1956 respectively, was satisfied that the plaintiffs had proven F the creation and acquisition of NCR by way of *Pemakai Menoa, Temuda* and *Pulau Telu*. Although the action was brought by the plaintiffs for only seven of them and not for the whole community, the learned JC found this to be insignificant as he opined that s 2(a) of the Cap 81 allows the creation and/or acquisition of the NCR either 'communal or otherwise' which means that G individual NCR can also be acquired on the said lands by all the plaintiffs. His Lordship was also of the view that the second defendant had failed to investigate the existence of any NCR over the said lands, the result of which the legal rights of the plaintiffs in the form of NCR were ignored and denied by the first and second defendants. Hence their rights to natural justice were denied H which vitiate the whole process of issuing of the said provisional lease. Hence the learned JC concluded that the provisional lease is illegal, null and void. There was also an issue of limitation raised by the defendants but was dismissed by the learned JC on the ground that a limitation period for a claim for NCR would only begin to run after such right had been clearly extinguished by the I relevant authority ie the first and second defendants in this case. Since the first and second defendants had never extinguished such right, there is therefore no limitation date to trigger the limitation period for the plaintiffs to commence this action. His Lordship therefore allowed the plaintiffs' claim with costs, hence the appeals.

ISSUES IN THE APPEALS

(a) whether the plaintiffs have created or acquired NCR over the said lands;

(b) whether the said provisional lease for Lot 11 is illegal, null and void; and

(c) whether the plaintiffs' claim is caught by limitation.

OUR DECISION

Whether the plaintiffs have created or acquired NCR over the said lands

[7] This is the most pertinent issue in these appeals. The plaintiffs' claim was for the area of 580.1 hectares more or less. The learned JC had found that the plaintiffs had proven that they had created or acquired NCR over the said lands covered by the provisional lease but limited to only 1,391.42 acres (equivalent to 563.088 hectares) as surveyed by PW5, a community surveyor and mapped by PW6, the Director of Programme and Community Mapping Coordinator of Borneo Resources Institute in Miri, Sarawak.

[8] As alluded to earlier, the learned JC had relied on the evidence of PW1 and PW3 that their ancestors and themselves had settled on the land at Sungai Kenyana before 1928 and had been carrying on farming activities on the said lands.

[9] He rejected the defendants' submission that the plaintiffs cannot claim to have acquired NCR over the said lands as based on evidence only a small portion of the whole area claimed by the plaintiffs totalling 23 hectares was cleared area in 1950 and 1954 and even in 1959. His reason was, 'clearing of land or *Temuda* is only part of the NCR lands. There are other practices such as *Pemakai Menoa, Pulau Telu*, *Pendam* and *Rubber* which have existed before 1958 and still subsist on the said lands'. His Lordship had concluded that the plaintiffs for themselves 'have proved the NCR over the *Pemakai Menoa* or *Pulau Telu* over the said lands'. We note that the learned JC had relied heavily on the decision of the High Court in *Usang ak Labit & 3 ors v Rosebay Enterprise Sdn Bhd* Suit No 21–1 of 2010.

[10] Before us, En Saferi, the Deputy State Attorney General Sarawak, who appeared for the first and second defendants submitted that based on the decision of the Federal Court in *Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals* [2017] 2 MLJ 281; [2017] 3 CLJ 1, the decision of the learned JC was, with the greatest respect, wrong. We were told that the appeal before us was deferred pending the outcome of the Federal Court in *TR Sandah*. En Saferi submitted that the

plaintiffs cannot claim under pemakai menoa or pulau telu as the decision of the Federal Court in *TR Sandah*, is obviously clear that the High Court and the Court of Appeal are not entitled to uphold a claim for NCR to land in Sarawak based on a native custom of *pemakai menoa* and *pulau*. What the law of Sarawak recognises in a claim for NCR, he further submitted, is the custom or adat of *temuda*. To reinforce his point, in his written submission, En Saferi quoted the following excerpts from the decision of His Lordship Raus Sharif PCA (as he then was) in *TR Sandah*:

> [67] We must not lose sight of an important fact that recognition alone that such custom or practice exist is not enough. Clearly, recognition of the existence of such practice had brought with it regulation and restriction. Our position is consistent with the principle as propounded in the case of *Nor Anak Nyawai* wherein it was held that the native customary rights claim over land founded upon the concept of continuous occupation does not extend to the areas of forests where the natives or their ancestors had entered into in search of food, jungle produce etc. What is essential as recognised by our courts is the custom of 'temuda' which is cultivation of land for occupation. This custom is essential and integral to the Iban culture which would include the custom of clearing, occupying and cultivating an area and included burial grounds and longhouse sites.
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> [68] As stated earlier, what the laws of Sarawak had recognised is the custom or adat of 'temuda' which was subsequently incorporated into 'Tusun Tunggu'. What is stated in 'Tusun Tunggu' read as follows:
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> > Theoretically all untitled land whether jungle or cleared for padi farming (Temuda) is the property of the Crown. The fact that Dayaks do clear a portion of virgin land for the site of their padi farms confers on them restricted rights of proprietorship over the land thus cleared. Once the jungle has been cleared it becomes 'temuda'. It is a recognised custom that 'temuda' is for the use of the original worker, his heirs and descendants. This is the only way Dayaks can acquire land other than by gift or inheritance.
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> [69] The above declaration in 'Tusun Tunggu' has been confirmed by the Federal Court in *Bisi Jinggut v Superintendent of Lands & Surveys Kuching Division & Ors* [2013] 5 MLJ 149; [2013] 6 CLJ 805, where Suriyadi Halim Omar FCJ speaking for the court said:
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> > [37] From the totality of evidence and authorities referred in the course of the hearing, we are satisfied that the creation of native customary land and rights acquired by a native of Sarawak, is conditional upon the adherence to custom or common practice of his community. For an Iban, it has the customary concept of Tusun Tunggu whereby NCR could be acquired by two mode namely clearing untitled virgin jungle *en route* to the creation of what is locally described as temuda and the other by receiving the temuda as a gift or inheritance. For the first mode, the common thread is that the acquisition of NCR starts with the clearance of the said untitled virgin land or jungle by a native, followed by the occupation of the cleared land and thereafter not allowing the land to be abandoned. Once abandonment whatever NCR was created or acquired previously over the land would be lost. If the original owner abandons the land

without more the community takes over. (Emphasis added.)

[70] The decision of the Court of Appeal in *Nor Anak Nyawai* was strongly criticised by Mr Baru Bian describing it short of sound legal reasoning. With respect, we disagree. We are of the view that the decision of the Court of Appeal in *Nor Anak Nyawai* is the correct statement of law. It is not only consistent with decisions of our courts in *Adong* and *Sagong* but also with other Commonwealth countries that native customary law over land are founded upon the concept of native's custom of continuous occupation. For example, in *Sagong*, the proprietary interest of the orang asli in their customary and ancestral land was limited only to the area that forms their settlement but not to the jungle at large where they used to roam to forage for their livelihood in accordance with their custom and tradition. As stated in the preceding paragraphs, the position in *Nor Anak Nyawai* is consistent with the methods of creating customary rights under the Sarawak Land Code vide s 5.

[71] The principle propounded in *Nor Anak Nyawai* and *Bisi Jinggut* is parallel to the position under the Sarawak Land Code. Section 5(1) of the Sarawak Land Code provides as follows:

> 5(1) As from the first day of January, 1958, native customary rights may be created in accordance with the native customary law of the community or communities concerned by any of the methods specified to subsection (2), if a permit is obtained under section 10, upon Interior Area Land. Save as aforesaid, but without prejudice to the provisions hereinafter contained in respect of Native Communal Reserves and rights of way, no recognition shall be given to any native customary rights over any land in Sarawak created after the first day of January, 1958, and if the land is State land any person in occupation thereof shall be deemed to be in unlawful occupation of State land and section 209 shall apply thereto.

[72] Under sub-s 2, the methods by which native customary rights may be created are:

> (2) The methods by which native customary rights may be acquired are:
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> (a) the felling of virgin jungle and the occupation of the land thereby cleared;
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> (b) the planting of land with fruit trees;
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> (c) the occupation or cultivation of land;
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> (d) the use of land for a burial ground or shrine;
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> (e) the use of land of any class for rights of way; or
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> (f) any other lawful method:
>
> Provided that:
>
> (i) until a document of title has been issued in respect thereof, such land shall continue to be State land and any native lawfully in occupation thereof

A shall be deemed to hold by licence from the Government and shall not be required to pay any rent in respect thereof unless and until a document of title is issued to him; and

(ii) the question whether any such right has been acquired or has been lost or extinguished shall, save in so far as this Code makes contrary provision, be B determined by the law in force immediately prior to the first day of January, 1958.

[73] Notwithstanding the methods prescribed above under sub-s 2, a permit can also be obtained from the Minister for the further creation of rights. Rights may also be available under the reserve system mandated by s 6 of the Sarawak Land Code. C

[74] Based on sub-s 2 of s 5 of the Sarawak Land Code, the underlying basis for the recognition of a particular native customary right to have the force of law is occupation of and its usage according to the customary practices of the community or communities concerned. In so far as occupation is concerned it was held in *Madeli Salleh* that occupation need not be actual occupation. As long as the natives D have control over the land through supervision and continual visitation it suffices.

[75] Thus, we agree with the views adopted by the Court of Appeal in *Nor Anak Nyawai*. We find nothing objectionable in the views expressed by the Court of Appeal in that case. On the contrary, we find that the Court of Appeal in the present appeals had erred in failing to consider that basis on the various orders of the Rajah E that the rights to land could only be established by a native who had cleared the primary jungle for the purpose of farming or cultivation.

[76] Although common law recognises unregistered native customs, this is subject to the adherence of all tenets of customary land law. It is a well-established principle F that having established that the custom of 'pemakai menoa' and 'pulau' exists, at the very least as a matter of fact, common law as developed in Malaysia further requires continues occupation and/or maintenance of the land in question.

[77] Based on what we have discussed above, the native customs of 'pemakai menoa' through the establishment of 'pulau' falls short of the prerequisites as provided for G under s 5(2) of the Sarawak Land Code and thus, do not have the force of law as envisaged under art 160 of the Federal Constitution.

[11] *TR Sandah*'s case, thus held that the High Court and the Court of Appeal were not entitled to uphold a claim for NCR to land in Sarawak based H on a native custom of *pemakai menoa* and *pulau*.

[12] Learned counsel for the plaintiffs pointed out that *TR Sandah*, was decided on a majority decision, three against one. He submitted, out of the three judges who had allowed the appellants/defendants' appeals, two of them I through His Lordship Raus Sharif PCA (as he then was) held that the NCR should be limited to the area which had been cleared and cultivated and should not extend to the remaining claimed area of virgin forest maintained under the Iban custom called *Pulau*. While Abu Samah Nordin FCJ in his judgment held that the issue whether the plaintiffs had acquired NCR under a custom known

as *Pulau* was a matter of evidence and there was no sufficient evidence to support the claim for such right in that case. A

[13] He further submitted that the plaintiffs in the instant appeal had adduced sufficient evidence to prove on a balance of probabilities that they and their ancestors had settled in the said lands before 1928 and have been in continuous occupation of the said lands including *Pulau Telu*. The plaintiffs had also established the presence of boundaries of the said lands with their neighbours. Hence adopting the approach taken by Abu Samah Nordin FCJ in *TR Sandah*, the plaintiffs have established NCR over *Pulau Telu*. B C

[14] Alternatively, learned counsel for the plaintiffs further submitted, if the approach of His Lordship Raus Sharif PCA (as he then was) were preferred, he urged this court to exclude *Pulau Telu* for the plaintiffs' native customary land and confine it to plots 1–8 as surveyed by PW5 totalling 720.48 acres, more or less. D

[15] We have thoroughly considered submissions made by parties on this first issue. There is no specific definition in Cap 81 on what is meant by NCR. However it does provide the definition of native customary land and this can be found in s 2 as follows: E

> (a) Land in which native customary rights, whether communal or otherwise, have been lawfully created prior to 1 January 1958, and still subsists as such; F
>
> (b) Land from time to time comprised in a reserve to which section 6 applies; and
>
> (c) Interior Area Land upon which native customary rights have been lawfully created pursuant to a permit under section 10. G

[16] For the purpose of this appeal, we are concerned with the definition in para (a) as it is the plaintiffs' contention that the NCR over the said lands had been lawfully created prior to 1 January 1958 and still subsist as such. H

[17] We are aware that the issue of NCR claim has been discussed in many cases that it is no more a novel issue. The burden to prove their claim is always on the plaintiffs, the natives, even though the law gives recognition to NCR claim by customary tenure. Hence the plaintiffs need to convince this court that they had acquired or created NCR over the said lands. I

[18] It was contended by the plaintiffs that they and their ancestors had settled in the said lands before 1928 and although PW1 is currently staying in

Bintulu, his wife and children are staying is the longhouse in the said lands and PW1 returns to his longhouse over weekend. As such, he had proven continuous occupation based on the decision of the Federal Court in *Superintendent of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as Administrator of the Estate of the deceased, Salleh bin Kilong)* [2008] 2 MLJ 677; [2007] 6 CLJ 509.

[19] Having read plethora of cases on this issue, we found that the position of our apex court has always been consistent in that the NCR claim over land founded upon the concept of continuous occupation does not extend to areas where the natives used to roam to forage for their livelihood.

[20] This has been emphasised by the majority decision of the Federal Court in *TR Sandah*, which endorsed the decision of this court in *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appea* [2006] 1 MLJ 256; [2005] 4 AMR 621 wherein this court had earlier followed the decision in *Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors* [2002] 2 MLJ 591; [2002] 2 AMR 169. Therefore we are of the view that the learned JC erred when he held that clearing of land or *Temuda* is only part of the NCR lands and that other practices such as *Pemakai Menoa* and *Pulau Telu* must also be included.

[21] The argument of learned counsel for the plaintiffs that the position is still not clear based on the judgment of Abu Samah Nordin FCJ in *TR Sandah*, in our view, does not hold water. The Federal Court had dismissed the plaintiff's claim in *TR Sandah*, based on 3–1 decision. Out of the three majority decision, two had confirmed the proposition that 'what is essential as recognised by our courts is the custom of *Temuda* which is cultivation of land for occupation. This custom is essential and integral to the Iban culture which would include the custom of clearing, occupying and cultivating an area and included burial grounds and longhouse sites'.

[22] Further, there was evidence of the defendants' expert, DW6, which was not challenged by the plaintiffs that almost the entire area claimed by the plaintiffs which is 580.1 hectares more or less, which is so huge, were covered with primary forest in 1950 and 1954 and even in 1959. Only a small portion of the whole area claimed by them which is totalling 23 hectares was cleared area in 1950 and 1954 and even in 1959. Except for PW1's & PW3's mere assertion, we found no other evidence to support the plaintiffs' claim.

[23] Yew Jen Kie J (as she then was) in *Everly Bajut ak Poh & 24 others v The State Government of Sarawak & 2 Ors* Civil Suit No 22–26 of 2008 had held as follows:

> In my judgment, the Plaintiffs have only adduced bare statement from PW1 ie the first Plaintiff that they have acquired native customary right over the alleged NCL under Iban customs and traditions ie through clearing cultivation and occupation of the areas throughout three generations. Not only there is no corroboration to their claim, their claim has been totally demolished by the aerial photographs taken in 1947 and 1962. They showed that the alleged NCL were still vast virgin jungle. Furthermore, a virgin jungle, once cleared, will take a hundred years to grow back to primary forest. Hence, it is my finding that the Plaintiffs have failed to prove on the balance of probability that they have acquired native customary right over the alleged NCL.

[24] We agree with the defendants that the same principle above ought to be applied in the present appeals that other than the plaintiffs' mere assertion, the plaintiffs had failed to prove they had acquired NCR over the said lands. As shown by Appendix A and Appendix B, the vast area of the said lands is a primary forest. There was also no evidence to show it was the plaintiffs' ancestors who had actually cleared and cultivated the said lands.

[25] Now learned counsel for the plaintiffs had urged this court, if the court prefers the approach of His Lordship Raus Sharif PCA (as he then was), to exclude *Pulau Telu* and confine the plaintiffs' claim to plots 1–8 as surveyed by PW5 totalling 720.48 acres, more or less. With due respect, for us to agree with this suggestion, the issue that has to be answered is, had the plaintiffs discharged their burden of proof that they had acquired NCR over the said eight plots?

[26] As alluded to earlier, we found that the plaintiffs' assertion that they had acquired the NCR was their bare assertion. Their evidence was self serving as being the plaintiffs, they were witnesses with interest. We do no better but to quote the decision of David Wong Dak Wah J (as His Lordship then was) in *Agi ak Bungkong & Ors v Ladang Sawit Bintulu Sdn Bhd & Ors* [2010] 4 MLJ 204; [2010] 1 LNS 114, as follows:

> ... It can be said that the evidence of the witnesses whom I have mentioned earlier are self serving as they are what I call witnesses with interest as they are the Plaintiffs. For me to determine whether their evidence is credible I look for objective evidence in the form of documents and evidence from witnesses with no interests, in that they do not gain from the outcome of this case.
>
> What I have set out are evidence of independent witnesses and documentary evidence which, in my view had corroborated the Plaintiffs' case. These evidence are good corroborative evidence which have been defined by Raja Azlan Shah FJ (as His Highness then was) in *Karthiyayani & Anor v Lee Leong Sin & Anor* [1974] 1 MLJ 119; [1974] 1 LNS 61 as follows (at p 120):
>
> > In my judgment the finding of the learned judge shows that certain salient features of this aspect of the evidence were missed or were not properly

A appreciated. It is settled law that a person cannot corroborate himself but it would appear that s 157 of the Evidence Act enables a person to corroborate his testimony by his previous statement. The section adopts a contrary rule of English jurisprudence by enacting that a former statement of a witness is admissible to corroborate him, if the former statement is consistent with the
B evidence given by him in court. The rule is based on the assumption that consistency of utterance is a ground for belief in the witness's truthfulness, just as inconsistency is a ground for disbelieving him. As for myself, although the previous statement made under s 157 is admissible as corroboration, it constitutes a very weak type of corroborative evidence as it tends to defeat the object of the rule that a person cannot corroborate himself. In my opinion the
C nature and extend of corroboration necessary in such a case must depend on and vary according to the particular circumstances of each case. What is required is some additional evidence rendering it probable that the story of the witness is true and that it is reasonably safe to act upon it. If a witness is independent, ie, if he has no interest in the success or failure of a case and his evidence inspires
D confidence of the court, such evidence can be acted upon. A witness is normally to be considered independent unless he springs from sources which are likely lo he *(sic)* tainted. If there are circumstances tending to affect his impartiality, such circumstances will have to be taken into account and the Court will have to same to a decision having regard to such circumstances. The court must examine the
E evidence given by such witness very carefully and scrutinise all the infirmities in that evidence before deciding to act upon it.

[27] Further there was this evidence of two *penghulus* DW3 and DW4 which we felt was relevant. DW3 had informed the court that his great grandmother
F by the name of Senia and his uncle Anji had a rubber tree farm in the said lands until today. According to DW3, there are 32 other long houses under his jurisdiction, which may have better claim, over the said lands.

[28] Hence, we agree with the defendants that if the basis of the plaintiffs'
G claim is *pemakai menoa* and *pulau*, then it must be for the whole community and cannot be for the seven plaintiffs only. The court should not allow other claimants, if any being deprived of the area claimed simply because they did not come to the court or were not together with the plaintiffs. See *Sanabung ak Sampai & Ors v Hydroflow Sdn Bhd & Ors* [2014] 7 MLJ 429, *Binglai Anak*
H *Buassan & Ors (suing on behalf of themselves and other proprietors, occupiers, holders and claimants of Native Customary Rights (NCR) land surrounding Kampung Sebat Dayak and Kampung Siru Dayak, situated at Semantan, 94500 Lundu, Sarawak) v Entrep Resources Sdn Bhd & Ors* [2014] MLJU 1908 and *Matu Tugang (suing on behalf of themselves and 42 other proprietors, occupiers,*
I *holders and claimants of native customary rights (NCR) land situated at Kampung Long Jaik, Sungei Seping, Belaga, 96900 Belaga, Sarawak) v Shin Yang Forestry Sdn Bhd & Ors* [2017] 7 MLJ 505; [2017] 2 CLJ 82.

[29] As submitted by the defendants, the court only recognises *temuda* as

NCR. Nonetheless, for the purpose of this case we cited those cases to show that, even if there is such practices of *pemakai menoa* and *pulau*, the above authorities will show that, the plaintiffs' claim ought to have been rejected.

[30] As we have found that the plaintiffs have failed to prove they have acquired NCR over the said lands, the second issue as to whether the said provisional lease for Lot 11 is illegal, null and void, in our view, has become superfluous and does not require any further determination.

[31] On the last issue of limitation again we feel that that the issue will be very pertinent if the plaintiffs could prove that they have acquired NCR over the said lands. Limitation, if proven, would definitely defeat their NCR's claim even when shown that it had been created or acquired. In the instant appeals, we have opined that the plaintiffs have failed to prove that they have created or acquired NCR over the said lands. Hence, like the second issue, we will not labour on this third issue as well.

CONCLUSION

[32] In the upshot, we found merit in both appeals. We therefore allowed both appeals with costs of RM5,000 for each set of the appellants subject to allocator. The order of the High Court was set aside. There was no deposit for Appeal No Q-01–79–03 of 2014. For Appeal No Q-02–524–03 of 2014, we ordered the deposit to be refunded to the third defendant.

Appeals allowed; High Court's order set aside.

Reported by Dzulqarnain Ab Fatar